Appendix E—Oral Opinions of District Court, July 13, 1965

"The Supreme Court of the United States on June 1, 1965, one justice dissenting, denied both a motion to accelerate the hearing of the appeal and a motion to stay our order pending appeal.

"Despite the foregoing, on or about June 22, 1965, one Frank J. Glinski and one William F. Keenan filed a suit in the Supreme Court of the State of New York, Albany County, seeking, among other things, an order restraining the Secretary of the State of New York from taking any action in obedience to our May 24, 1965, order.

"On July 5, 1965, a justice of that court granted that prayer, and on July 9, 1965, after the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, on July 7, 1965, had unanimously reversed the lower court, the New York Court of Appeals reversed the Appellate Division and reinstated the Supreme Court justice's injunctive order.

"On July 9, 1965, application was then made to this court for an order requiring Glinski and Keenan to show cause why they and all parties to this action should not be enjoined from interfering with the carrying out or execution of our order of May 24, 1965, and for other relief appropriate to effectuate said order; and

"Now, after notice of said application hearing thereon this day, and due deliberation, it is hereby ordered that Frank J. Glinski, William F. Keenan and all parties to this action, their agents, attorneys and servants, their successors and all other persons are hereby forever restrained and enjoined from interfering with the carrying out and execution by any and all New York State officers and elec-

tion officials and their successors and all other persons of the order of this court of May 24, 1965.

"Dated: July 13, 1965.

STERRY R. WATERMAN,
United States Circuit Judge

SYLVESTER J. RYAN,
United States District Judge

RICHARD H. LEVET,
United States District Judge."

I hereby, in the presence of counsel in open court, hand this original signed order to the clerk of the court.

I used June 28th because that is what the Court of Appeals used, and I would like to comply with that. Since it is June 22nd, will you change that.

Your rights are preserved, sir.

Mr. Rifkind: I want to ask one question. I want to be sure that I am not in contempt if I pursue further the application that I made to Mr. Justice Harlan for a stay of the May 24th order.

Judge Waterman: That, sir, is ~~recognized~~ recognition by the very Act itself, the legitimacy and the power and force of this order. You are encouraged to do it, sir.

Mr. Rifkind: Thank you, sir.

Mr. Fleming: Your Honor, if it may please the court, may I formally, if it is consistent with your procedure, ask for a stay of the order you have just entered—

Appendix E—Oral Opinions of District Court, July 13, 1965

Judge Waterman: For what purpose?
Mr. Fleming: For the purpose of appeal, your Honor.
Judge Waterman: Motion denied.
Any further motion?
Anybody wish on the record to protect any rights.
Court recessed.

APPENDIX F

Order of New York Court of Appeals

COURT OF APPEALS

State of New York, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 9th day of July in the year of our Lord one thousand nine hundred and sixty-five, before the Judges of said Court.

Witness,

THE HON. CHARLES S. DESMOND,
Chief Judge, Presiding.

RAYMOND J. CANNON, Clerk

Remittitur July 9, 1965.

3. No. 300 65

FRANK J. GLINSKI, individually and as State Senator for the 56th Senatorial District of New York, & ano.,

Appellants,

—vs.—

JOHN P. LOMENZO, individually and as Secretary of State of the State of New York,

Respondent.

BE IT REMEMBERED, that on the 8th day of July in the year of our Lord one thousand nine hundred and sixty-five,

Frank J. Glinski, individually and as State Senator for the 56th Senatorial District of New York, & ano., the appellants in this cause, came here unto the Court of Appeals, by Robert B. Fleming, their attorney—, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And John P. Lomenzo, individually and as Secretary of State of the State of New York, the respondent— in said cause, afterwards appeared in said Court of Appeals by Louis J. Lefkowitz, Attorney General.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, the said Court of Appeals having heard this cause argued by Mr. Robert B. Fleming, of counsel for the appellants, and by Mr. Orrin G. Judd of counsel for the respondent—, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is modified, without costs, by reinstating so much of the order of Special Term as contained an injunction against the holding of an election on November 2, 1965, under Plan A, and, as so modified, affirmed.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be modified, without costs, &c., as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

/s/ RAYMOND J. CANNON
Clerk of the Court of Appeals of
the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
Albany, July 9, 1965.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

[SEAL]

/s/ RAYMOND J. CANNON
Clerk

APPENDIX G

Opinions of New York Court of Appeals

STATE OF NEW YORK

COURT OF APPEALS

GLINSKI v. LOMENZO

DESMOND, *Ch. J.*:

I would modify the order appealed from by reinstating the Special Term's injunction against a 1965 election of legislators under Plan A (and to this reinstatement a majority of this Court agrees).

To bring to a prompt end the present difficulties, some of us would add to our mandate these additional directions: first, that a constitutional convention be held beginning March, 1966 with delegates to be elected at this Fall's general election; and, second, that until an election of legislators under a valid districting plan, the presently seated legislators shall continue to sit, and to vote under an appropriate system of weighted voting.

As we have not hesitated to do in the past (*Moore* v. *Walsh*, 286 N.Y. 552) we must perform our sworn duty by preventing the holding of an election which violates our state constitution. The *Moore* decision (and *Burke* v. *Terry*, 203 N.Y. 293) is flat and compelling authority for the exercise of such power by us and the unconstitutionality of holding an election of legislators under Plan A in 1965 is much clearer than was the alleged infringement acted on in *Moore* v. *Walsh*.

Neither Federal supremacy (U.S. Const. Article VI) nor the rules against interference with federal courts by state

courts (U.S. Const., Analysis and Interpretation, U.S. Printing Office, 1964, pp. 709-727) have any application here. I find no binding federal court order forbidding us to deal with this problem of state government—indeed, the district court (twice) and the United States Supreme Court itself has suggested or directed that as to state questions the state courts are still empowered to control state elections (see *Reynolds* v. *Sims,* 377 U.S. 533, 584). It is impossible to escape the fact that an election of legislators this fall would violate in at least two respects the positive provisions of our state constitution—as to elections every two years and as to the number of Assemblymen (N.Y. Const., Article III, § 2; *Matter of Orans,* 15 N.Y. 2d 339). Despite those illegalities of "Plan A" under which a 1965 election is supposed to be held, we would of course be obliged to respect and follow the federal courts' orders that such an election this year if those courts had made final and binding orders therefor. To repeat, I have seen no such order. All the previous federal decisions were based on the assumption that the 1964 or the 1965 legislature would—neither did—pass a valid legislative districting statute. The May 24, 1965 decision of the federal three-man district court did no more than decline to change its previous orders. Obviously and under settled principles, the subsequent denial of a stay by the United States Supreme Court decided nothing. The appeal to that court still pends.

Basically, the question is: Shall we obey the positive directions of our own state constitution in the absence of a controlling decision otherwise commanding that an un-

constitutional election be held? I answer: "Yes". The injunction prayed for must be granted.

The order should be modified, without costs, in accordance with this opinion.

BURKE, *J.* (concurring)

The time and method of holding an election for state officials is a state question. The United States Supreme Court has directed that the greatest possible deference be paid to state action. *Reynolds* v. *Sims,* 377 U.S. 533; *Scott* v. *Germano* U.S. , 33 U.S.L.W. 3387, June 1, 1965. But the 1964 and 1965 legislatures have failed to provide legislative apportionment by a constitutional election or otherwise to carry on government.

Since both the present legislative apportionments are totally void, *W.M.C.A. Inc.* v. *Lomenzo,* 277 U.S. 633 (1964); in *Re Orans,* 15 N.Y. 2d 339, and since the United States Supreme Court had directed that an election be held in 1965 *only if* there is a valid legislative apportionment, the defendant must be enjoined from holding an election under Plan A which would place power in the case of an illegally constituted legislature, in *Re Orans, supra.* Therefore, an election this year can only be held constitutionally by providing that the proper number of legislators be elected at large. Under these circumstances, I would limit the relief sought by the plaintiffs to a reversal of the order of the Appellate Division and the reinstatement of the order and judgment of the Supreme Court, Albany County.

FULD, VAN VOORHIS and BERGAN, *JJ.*, dissent in the following memorandum:

In our view, the decision now being handed down serves only to further confound a most unfortunate and confused situation.

The members of the New York State Legislature who are now in office were elected under an apportionment which the Supreme Court of the United States has held to be invalid under the Fourteenth Amendment to the Constitution of the United States. (See *WMCA, Inc.* v. *Lomenzo*, 377 U.S. 633.) The decision of the three-judge Federal District Court directing an election in 1965 under "Plan A" (Reapportionment Compliance Act, L. 1964, ch. 976) implements the Supreme Court's holding in the *WMCA* case (377 U.S. 633 *supra*). That there should be an election this year, 1965, in order to avoid the consequences of the prior unconstitutional malapportionment was evidently a primary object of the federal courts in arriving at their conclusion (see, e.g., *Hughes* v. *WMCA, Inc.*, 379 U.S. 694) and, some six weeks ago, the three-judge district court concluded that there was insufficient time to fashion any new apportionment scheme without jeopardizing an election in 1965. (See *Travia* v. *Lomenzo*, 241 F. Supp. .)

For the courts of the state now to grant injunctive relief, preventing the holding of an election in 1965, would be in direct conflict with the district court's decision, a decision which, in view of the Supreme Court's recent denial of an application for a stay, has that tribunal's implicit approval. (See *Travia* v. *Lomenzo*, U.S. , 85 S. Ct. 1582.)

Such a conflict between federal and state judicial power should be avoided in the interest of the public order and the proper administration of justice. In this litigation, the federal courts long ago assumed jurisdiction to implement the reapportionment decisions of the United States Supreme Court and, even if our state courts possessed a concurrent jurisdiction, the established rule is that under such circumstances the court first exercising jurisdiction does so to the exclusion of the other. We should not here depart from this rule.

The order appealed from should be affirmed.

BERGAN, *J.*:

The direction of the federal District Court for the election of a Legislature in 1965 in accordance with the terms of the 1964 apportionment statute is in conflict with the New York constitution, both by the constitution in itself and by the decision of this Court interpreting the New York constitution and holding the statute invalid (*Matter of Orans*, 15 N.Y. 2d 339). Under New York Law, then, no election should be held in 1964 or will be valid, if held.

But, a direction to hold such an election has been made, nevertheless, as an exercise of federal judicial power, and the United States Supreme Court has not yet interfered with this order made by the District Court, although its attention has been called to the violation of our constitution and the contrary decision of this Court.

But to grant a state court injunction against the enforcement of a federal court order amounts to a confrontation of power which ought to be avoided if possible, in the interest of orderly government within the Federal Unit, en-

tirely aside from the vagaries of the supremacy clause as applied to a situation of this kind.

The result of the decision now being made is that a court of one sovereign authority has directed the New York Secretary of State to prepare an election in 1965 and the court of another sovereign authority has prohibited him from doing just that.

The legal differences over the exercise of the power of New York to govern itself can be resolved definitively by the Supreme Court of the United States in reviewing the decision of this Court; and cannot be resolved adequately by a clash of conflicting orders between the New York Supreme Court and the United States District Court. Because of this, the order appealed from should be affirmed.

* * * * *

Order modified, without costs by reinstating so much of the order of Special Term as contained in injunction against the holding of an election on November 2, 1965 under Plan A, and, as so modified, affirmed. Opinion by Desmond, Ch. J. in which Dye and Scileppi, J.J. concur; Burke, J., concurs for modification in a separate opinion; Fuld, Van Voorhis and Bergan, J.J., dissent and vote to affirm in a memorandum, Bergan, J., in a separate opinion.